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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 349.

JOHN CLAY, *Petitioner*,

vs.

SUN INSURANCE OFFICE LIMITED, *Respondent*.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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29 American Jurisprudence (Insurance, Section 1394), page 1041 5

Carnahan, Conflict of Laws and Life Insurance Contracts (1958), Section 137, page 657 4

7 Couch, Insurance, Section 1629, page 5704 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

JOHN CLAY, *Petitioner,*

vs.

SUN INSURANCE OFFICE LIMITED, *Respondent.*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

John Clay, by his undersigned counsel, petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 8th, 1959.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit record (R. 113-125) printed in Appendix "B" hereto is reported in 265 F.2d 522.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on April 8, 1959 (R. 126). Rehearing was denied on May 28, 1959 (R. 149). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED FOR REVIEW.

Should a federal court sitting in Florida recognize a "suit clause" contained in a personal property insurance policy issued in Illinois but under which loss occurred in Florida, the insured at the time of the loss being a resident of the State of Florida? All of the property for which the claim was made having been located in the State of Florida and the insurer being admitted to do business in Florida?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provision upon which the Court below based its opinion is the due process clause of the Fourteenth Amendment to the Constitution of the United States which provides, as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

The statutes involved in this case are Section 95.03, Florida Statutes 1957, and Ill. Rev. Stat. 1957, Chapter 73, Section 837, which are printed in Appendix "A" and Appendix "B" of this petition.

STATEMENT OF THE CASE.

A complaint was filed by the petitioner John Clay against the respondent Sun Insurance Office, Limited, on May 20, 1957, in the United States District Court for the southern district of Florida, Miami division, seeking to recover $13,500.00 claimed as damages for loss of personal property under a personal property floater policy issued to the petitioner by the respondent on April 22, 1952 (R. 2, 3, 4). Attached to the complaint is a copy of the insurance policy (R. 8 to 13). The jurisdiction of the District Court was invoked because of the diversity of citizenship of the parties to the suit and the fact that the amount in controversy exceeded, exclusive of interest and cost, the sum of $3,000. Service was had upon the respondent and answer to the complaint was filed June 12, 1957 (R. 4, 5, 6, 7). In the answer, by way of affirmative defense, the respondent raised the question of the suit clause contained in the policy (R. 5-6). The suit was tried before a jury in West Palm Beach, Florida, on June 4, 1958, and a verdict was entered in favor of the petitioner in the sum of $6,800 (R. 14) and final judgment was filed June 4, 1958, in accordance with the verdict of the jury (R. 14-15). On June 12, 1958, the respondent filed "Motion for judgment *non obstante veredicto* or in the alternative, for a new trial" (R. 15-16). Paragraph 7 of the motion dealt with the question presented in this petition (R. 16). The matter was heard by the United States District Court on July 15, 1958, and an order denying the motion and setting a supersedeas bond was entered on the same date (R. 17). Notice of appeal was then filed on August 8, 1958 (R. 17-18). Thereafter briefs were filed by the appellant and the appellee in the lower court and the matter was argued before the United States Court of Appeals sitting in Jacksonville,

Florida, on March 11, 1959. On April 8, 1959, the United States Court of Appeals for the Fifth Circuit rendered its opinion reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (R. 126). On April 21, 1959, the petitioner filed his motion for an extension of time to file for rehearing and briefs (R. 127-129), and on April 23, 1959, the extension of 20 days was granted to April 29, 1959, together with an extension of time for the Attorney General of the State of Florida to file motion for rehearing and brief as *amicus curiae* on behalf of the State of Florida (R. 127). Brief by the Attorney General of the State of Florida was subsequently filed (R. 138-148) and on May 28, 1959, the United States Court of Appeals entered its order denying the petition for rehearing (R. 149). No opinion was rendered in connection with the order denying rehearing. In the original opinion of the United States Court of Appeals (R. 113-125) and in the order denying rehearing one of the Judges dissented from the majority opinion and considered it advisable to state his personal views.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

Along with many of its sister states (Carnahan, Conflict of Laws and Life Insurance Contracts (1958), § 137, page 657; 7 Couch on Insurance, § 1629, page 5704), the State of Florida has by statute undertaken to forestall the insertion in insurance policies of stipulations for the bringing of suit within a limited time. Florida's statute declares stipulations in contracts to be "illegal and void" and provides that "No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." (§ 95.03, Florida Statutes, 1957. See Appendix

"A"). The Illinois statute deals only with life insurance contracts (Ill. Rev. Stat. 1957, Ch. 73, § 837. See Appendix "B").

The appellant, Sun Insurance Office, Limited, which does business in both Illinois and Florida, in an attempt to derive the greatest possible advantage from the more lax laws of Illinois, placed in the insurance contract in question the following clause:

> "Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives ris he claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

The general rule is stated in 29 Am. Jur. (Insurance, § 1394), page 1041, as follows:

> "* * * Where the statutes of the forum make void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law, a contractual stipulation made in another jurisdiction is not available as a defense."

This proposition is supported by the decisions in *Galliher* v. *State Mutual Life Insurance Co.*, 150 Ala. 543, 43 So. 833 (1907); *Asel* v. *Order of United Commercial Travelers*, 197 S.W.2d 639 (Mo. 1946); *Gulf Insurance Co.* v. *Holland Construction Co.*, 236 S.W.2d 1003 (Ark. 1951); *contra: Union Central Life Insurance Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339 (1917) (no statute involved).

The court in its opinion of April 8, 1959, held that a violation of due process would result if § 95.03, Florida Statutes, 1957, were applied to the insurance contract in question. In reaching this conclusion the court relied upon *Home Insurance Company* v. *Dick,* 281 U.S. 397 (1929); *Holderness* v. *Hamilton Fire Insurance Company of New York,* 54 F. Supp. 145 (S.D. Fla. 1944); *Hartford Accident and Indemnity Company* v. *Delta Pine Land Company,* 292 U.S. 143 (1933). None of these three cases takes the arbitrary position that the place of contracting necessarily and in all circumstances controls the validity of stipulations as to the time within which suit must be brought. In each of these cases the court takes the position that on the particular facts of that case, sufficient connections were lacking between the state of the forum and the contract to justify the forum imposing its public policy considerations upon the contract. Each of these cases is clearly distinguishable from the case at bar.

In the case of *Home Insurance Company* v. *Dick, supra,* the forum had substantially no connections with the contract whatsoever. The contract was made in another jurisdiction, the loss occurred in another jurisdiction, and the risk under the insurance policy was never within the jurisdiction of the forum. Similarly in the *Holderness* case, *supra,* the ferum was merely the place in which the suit happened to have been instituted. In that case the insurance policy was entered into in North Carolina, the property insured had its situs in North Carolina and the loss occurred in North Carolina. In that case Florida was merely the forum and nothing more.

In the case at bar, however, throughout substantially all of the contract period, the property insured was in the State of Florida. The loss to the property occurred in

Florida and consequently the cause of action arose in that state. Florida was therefore, the "natural" or "normal" forum. In addition the insured was a *bona fide* resident of Florida at the time the cause of action arose and at that time the insurer was admitted to do business in Florida. The only connection of the State of Illinois with the contract was that the contract was issued in Illinois. If it can be asserted that there are any circumstances in which a state, other than the state in which a contract was made, has sufficient interest in the contract to impose its statutes to nullify the contract stipulation on the basis of its public policy, then the case at bar presents such situation.

The facts of the *Delta Pine Land Company* case, *supra*, are more similar to the facts of the case at bar. In that case the cause of action apparently arose in the State of Mississippi where the suit was brought and in which a statute similar to Section 95.03, Florida Statutes, 1957, was in existence. Certain other factors in that case, however, are not identical with the case at bar. In the *Delta Pine Land Company* case, the risk was not a risk of property loss in which there was a situs of the property. The risk was one involving the honesty of employees which employees were located in several states. In the case at bar the property insured had a situs in Florida and the risk was all concentrated in that state. However, the primary difference between the *Delta Pine Land Company* case and the case at bar is that the former did not involve a contract stipulation involving the time within which suit must be brought. That case involved a stipulation requiring that a claim must be presented to the insurer within fifteen months after the termination of the suretyship (See Appendix "D").

Thus the holding in the *Delta Pine Land Company* case cannot be considered to be a holding directly in point, as

a contract stipulation regarding the time within which suit must be brought was not at issue in that case. The language of that case, however, is most important. The court said that the question is basically one of "the relative importance of the interest of the forum as contrasted with those created at the place of the contract, * * *" (292 U.S. 150).

In addition to the factors in the case at bar that the property insured was located in Florida throughout most of the policy period, that the insured was a citizen of Florida throughout most of the policy period, that the insurer was admitted to do business in the State of Florida during all of the policy period, and that the loss occurred in Florida, several other factors pertaining to this particular type of contract are relevant. A contract of insurance is not an ordinary bilateral contract. There is no "meeting of the minds" between both parties on all of the policy provisions. A contract of insurance is a contract prepared in its entirety by the insurer and it is accepted by the insured. He has no control whatsoever over any of the terms of the policy. The only protection an insured has against unfair, unreasonable or improper provisions in the contract of insurance is the fact that, in most states, regulation is imposed on the insurer in regard to policy forms. Such form contracts are subject to the public policy of the forum (Cf. *The Kensington*, 183 U.S. 263 (1901)).

A final consideration is that an agreement to fix a period of limitations by contract is a matter which relates to the administration of justice and is not entitled to the same protection accorded to ordinary contract provisions (Cf. *Carbon Black Export* v. *The SS Monrosa*, 254 F.2d 297 (5th Cir. 1958), cert. denied 359 U.S. 180 (1959)).

If the interests of the forum are sufficient neither the due process clause nor the full faith and credit clause of the Federal Constitution require the forum to apply the normal conflict of laws rules (Cf. *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532 (1934); *Young* v. *Masci*, 289 U.S. 253 (1930)). In the case at bar the interests of the State of Florida are superior to the interest of any other state because Florida was the place of performance of the contract, it was the place in which the cause of action arose, it was the state of the policyholder's domicile, the insurance company was subject to regulation of its business by Florida, and, finally, because contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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West Palm Beach, Florida,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

The undersigned of counsel for petitioner hereby certifies that a true and correct copy of the foregoing petition for writ of certiorari has been served on Joe C. Brannen, Esq., Wicker & Smith, 505-6 Ainsley Building, Miami, Florida, counsel for the respondent, by depositing the same in a United States post office, with air mail postage prepaid, in strict accordance with Rule 33 of the Revised Rules of the

Supreme Court of the United States, effective July 1, 1954.
This 25th day of August, 1959.

.....,

W. TERRY GIBSON,
Of Counsel for Petitioner.